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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 230

40 CASES, MORE OR LESS OF SIX ONE-GALLON CANS ARTICLE LABELED IN PART (CAN) "PINOCCHIO BRAND 75 PERCENT CORN, PEANUT OIL AND SOYA BEAN OIL BLENDED WITH 25 PERCENT PURE OLIVE OIL—PACKED BY A.M.S. PACKING COMPANY—," AT SYRACUSE, NEW YORK, AND A.M.S. PACKING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–21) is reported at 289 F. 2d 343. The opinion of the district court (R. 12–16) is reported at 188 F. Supp. 290.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1961 (Pet. 22–23). The petition for a writ of certiorari was filed on July 14, 1961. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a blend of food oils prepared wholly from component oils of interstate origin, which is adulterated and misbranded while held for sale in the State in which the blend was prepared, is beyond the reach of the Federal Food, Drug, and Cosmetic Act and Congress' power under the commerce clause of the Constitution.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1044, as amended, 62 Stat. 582 (21 U.S.C. 301 *et seq.*) provides in pertinent part:

Section 201(f) (21 U.S.C. 321(f)):

> For the purposes of this Act—
> (f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

Section 304(a) (21 U.S.C. 334(a)):

> Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

STATEMENT

This is a seizure action *in rem* under the Federal Food, Drug, and Cosmetic Act involving a number of cases of blended food oils alleged to have been both misbranded and adulterated "while held for sale after shipment in interstate commerce" in that the cans were falsely labeled as containing 25 percent olive oil when they actually contained little or no olive oil, and in that a mixture of vegetable oils with little or no olive oil had been substituted for a blend of vegetable oils and olive oil. The libel also alleged that this food, labeled "Pinocchio Brand 75 percent corn, peanut oil, and soya bean oil blended with 25 percent pure olive oil," had been manufactured by the claimant-petitioner A.M.S. Packing Co., Ozone Park, New York, from ingredient oils received in interstate commerce: corn oil and soya oil from New Jersey and Illinois, peanut oil from Georgia and New Jersey, and olive oil from Spain, Italy and Tunisia. The particular lot involved had been shipped by petitioner from Ozone Park, New York, to a company in Utica, New York, which delivered it to another company in Syracuse, New York, where it was seized (R. 1–7).

Petitioners filed a claim and answer denying the allegations of misbranding and adulteration and praying dismissal of the libel for lack of jurisdiction on the ground that "the goods seized herein were blended and/or manufactured * * * in Ozone Park, New York, and shipped by it to * * * Utica, New York,

* * * and that such sale constitutes intrastate commerce and not interstate commerce * * *" (R. 8–9).

The district court dismissed the libel, holding that the blend of oils was "a new product or complete article of intrastate manufacture" (188 F. Supp. at 291) which did not come within the reach of the clause, "while held for sale (whether or not the first sale) after shipment in interstate commerce," in Section 304(a) of the Act (*supra*, p. 2).

The court of appeals reversed. It rejected the reasoning of the district court that the mixture of oils "constitute[s] a 'different product' from a blend of less than all or from a pure measure of any one of them" (Pet. 20) and held that (Pet. 21):

> Congress surely intended the provisions of the Food, Drug, and Cosmetic Act to apply to foods processed within a state, after shipment in interstate commerce, as was the case here. The statute must be read and applied broadly in order to effectuate its remedial purpose. * * *

ARGUMENT

1. Petitioners' contention is that the mixing together of several types of food oils, all of which are received in interstate commerce, creates a "new" article of food that is beyond the reach of the Federal Food, Drug, and Cosmetic Act so long as the sale of the mixture is confined to the State in which the mixing occurs (Pet. 7–12). This theory provides an easy method of evasion and is contrary to the pertinent history of the statute.

The clause in question here, authorizing the seizure of food that is adulterated or misbranded "while held for sale (whether or not the first sale) after shipment in interstate commerce" (*supra,* p. 2), was added by an amendment in 1948 (62 Stat. 582). The purpose of the amendment to reach just such conduct as is involved in this case was clearly stated in S. Rep. No. 1221, 80th Cong., 2d Sess., pp. 3–4:

> In order to prevent the frustration and defeat of its purpose, Congress must exercise its power to continue that protection against articles that become filthy, decomposed, deteriorated, or otherwise adulterated or misbranded while awaiting sale to the ultimate consumer. Otherwise the safeguards which were designed to maintain the integrity of the products to the end of their interstate journey become valueless.
>
> The defilement of products or deterioration in quality or misrepresentation through relabeling or other abusive acts which occur at any time before articles have been sold to consumers leads to dissatisfaction and lack of confidence which depresses the interstate demand for goods of the same type that are neither adulterated nor misbranded. * * * it is necessary that the integrity of the products be preserved so far as possible, up to the time of purchase by the ultimate consumer. * * *[1]

It is noteworthy that one of the specific abuses cited to the Senate Committee by the Associate Commissioner of Food and Drugs as showing the need for the amendment was this:

[1] H.R. Rep. No. 807, 80th Cong., 1st Sess., p. 6, was to the same effect.

> * * * We have known of instances where cans of olive oil would be tapped, and the olive oil drawn off wholly, or in part, and a cheaper oil inserted in lieu of the olive oil; the label of course, bearing the designation "olive oil."[2]

Both the plain language of the statute and this legislative history make it clear that if petitioners had relabeled with the Pinocchio brand label the corn oil received, properly labeled, in interstate commerce, it would have been adulterated and misbranded and therefore subject to seizure. The question here is whether petitioners can, with impunity, accomplish the same abuse by removing several different kinds of oils from properly labeled containers and then placing the oils in new containers which falsely describe the composition of the blend. It would take an extremely narrow view of what Congress has written to hold that this consumer cheat is beyond the reach of the Act.[3]

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[2] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Cong., 2d Sess., on S. 1190 and H.R. 4071, April 17, 1948, p. 9.

[3] Cf. *United States* v. *Allbrook Freezing and Cold Storage, Inc.*, 194 F. 2d 937, 939, where the Fifth Circuit stated: "Nor do we find any better taken the second ground for dismissing the libel, that the strawberries after being processed ceased to be the strawberries which moved in interstate commerce and became a new product which cannot be seized unless and until it moves in interstate commerce in its changed form. If this were a sound view, and adulterated constitutents of processed products could be seized only when in their unprocessed form, the enforcement of the act would be easily defeated. That it is not sound, a reading of the Act, which contains no such limitation makes clear. * * *"

See also *United States* v. *4 Devices* * * * "*Color Therm*", 176 F. 2d 652 (C.A. 10); *Lee* v. *United States*, 187 F. 2d 1005 (C.A. 10).

Moreover, the statute defines "food" to include components, Section 201(f), *supra*. The olive oil—little of it as there is in this mixture—is the most expensive and desirable component of the product, such that it controls the market price,[4] and it is misbranded while held for sale because it is described as a 25 percent component when in truth it is a mere trace. The vegetable oil components which comprise the remainder of the blend are equally misbranded while held for sale after interstate shipment because they are falsely labeled to contain a significant amount of olive oil.

Petitioners' *in terrorem* argument that the decision below leads to "ludicrous" results, whereby the use of any innocent interstate ingredient in the manufacture of a product to be sold locally brings the product within the reach of the Act (Pet. 10–11), hardly fits the facts of this case. For as the court of appeals pointed out (Pet. 20):

> in this case all the components of the oil blend had been transported in interstate commerce, and the completed mixture was being held for sale as "oil"—the very same type of food which had traveled across the state line. This is not a case in which oil which was transported interstate was used as one of many ingredients in

[4] "Olive oil is more expensive, and is regarded by consumers as more desirable, than vegetable oils. To cheat consumers, some blenders sold blends of olive and peanut oil (or of other vegetable oils) containing a smaller percentage of olive oil than that stated on the labels. * * *" *United States* v. *Antonio Corrao Corp.*, 185 F. 2d 372, 376 (C.A. 2).

> a finished product which in no way resembled the food which had crossed state lines. * * *[1]

If Congress intended the 1948 amendment to accomplish *any* extension in the coverage of the Act, it surely meant to include such a factual situation as this one.

Petitioners' reliance upon *United States* v. *An Article or Device Consisting of 31 Units* * * * *Labeled "Gonsertron Corporation,"* 180 F. Supp. 52 (E.D. Mich.), is misplaced. There the components that had been shipped interstate were ordinary electrical fixtures, shipped with no intention that they be used in assembling a therapeutic device. They were purchased on the open market by the claimant, who originated the idea that the assembled machine had therapeutic and diagnostic merit. Thus, unlike the situation here where all the component oils had been received in interstate commerce, no "device"—defined by the Act as an article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease (21 U.S.C. 321 (h))—had moved interstate. The same district judge who decided the *Gonsertron* case later distinguished it on that ground in *United States* v. *An article of drug consisting of 39 Cases* (*Korleen*), 192 F. Supp. 51 (E.D.Mich.). The court

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[1] In rejecting a similar contention in *United States* v. *Sullivan*, 332 U.S. 689, 694, this Court said: "The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its different misbranding provisions which relate to food, cosmetics, and the like. There will be opportunity enough to consider such contingencies should they ever arise."

of appeals below distinguished it on the same ground (Pet. 20–21).[6]

If petitioners are right in their contention that misbranding or adulteration of food "while held for sale * * * after shipment in interstate commerce" can be removed from the reach of the Act by any change, however slight, in the form of the product, there would be a significant loophole for evasion. For example, many misbranders and adulterators of food and drugs that move in interstate commerce could get around the Act simply by "decentralizing" certain phases of their operations. A nationwide operator who, before the 1948 amendment, could get away with mixing or processing his product at one central location and then shipping it interstate for misbranding or adulteration in the state of sale,[7] could now escape the effect of the amendment by varying his operation solely to the extent of doing the mixing or processing at the same place he does

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[6] *Brosious* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (C.A. 3), also cited by petitioners (Pet. 12), is not at all in point. That was a suit for treble damages under the anti-trust laws. The holding that the interstate movement of the beverage concentrate ended before it was combined with sugar and carbonated water and then bottled has no bearing at all upon the application of the clause of the Federal Food, Drug and Cosmetic Act involved here, providing for the seizure of an article that is adulterated or misbranded "while held for sale * * * after shipment in interstate commerce." See *United States* v. *Sullivan*, 332 U.S. 689.

[7] *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453 (C.A. 9), certiorari denied, 330 U.S. 818, so held. It was one of the purposes of the 1948 amendment to cure the defect revealed by this decision. See S. Rep. No. 1221, 80th Cong., 2d Sess., p. 1.

the misbranding or adulteration. And if the simple mixing involved in the instant case is a sufficient "change in form" to achieve this result, presumably almost anything, such as addition of a coloring agent, would do. It is not reasonable to suppose that Congress intended to permit such artificial distinctions to defeat its purpose.

2. *United States* v. *Sullivan*, 332 U.S. 689, is a conclusive answer to petitioners' contention (Pet. 12–15) that the application of the statute to its intrastate activities is beyond the power of Congress under the commerce clause of the Constitution. That was a criminal prosecution for violation of Section 301(k) of the Act (21 U.S.C. 331(k)), which prohibits "the doing of any * * * act with respect to a * * * drug * * * if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being * * * misbranded." The case involved a 1,000-tablet bottle of sulfathiazole that, when it was shipped in interstate commerce, was in compliance with the law. The defendant, a retail druggist, purchased the properly labeled interstate package from a local wholesaler for his drugstore. Nine months later he removed some of the tablets from the interstate container and caused them to be misbranded before he sold them to the consumer. This Court held that Section 301(k) "unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the inter-

state shipment" (332 U.S. at 696); that the section was "designed * * * to extend the Act's coverage to every article that had gone through interstate commerce until it finally reached the ultimate consumer" (*id.*, 697); and that as so construed it was not beyond the authority of Congress and did not invade the powers reserved to the States (*id.*, 697–698).

In passing the 1948 amendment on which the instant case centers, Congress gauged the extent of its constitutional power by the *Sullivan* case:

> The Supreme Court's decision in the Sullivan case has ended any doubts that may have existed as to the authority of Congress to regulate in the manner proposed by this bill. * * * (S. Rep. No. 1221, 80th Cong., 2d Sess., p. 4)

Surely, if Congress has the power to punish the act of a Sullivan in removing a few pills from an innocent interstate package and selling them, misbranded, to a local purchaser long after the interstate shipment had come to rest, there can be no question of its constitutional power to authorize the seizure of the mixture of innocent interstate oils that petitioner misbranded and adulterated.

CONCLUSION

The decision below is a correct application of established principles. No conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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